



October 4, 2001

Mr. K. Scott Oliver  
Assistant Criminal District Attorney  
County of Bexar  
300 Dolorosa, Suite 4049  
San Antonio, Texas 75205

OR2001-4474

Dear Mr. Oliver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152771.

The Bexar County Sheriff's Department (the "department") received a request for information concerning a named deputy sheriff, including personnel files and records relating to citizen complaints, disciplinary actions, and internal affairs investigations. You claim that the requested information is excepted from disclosure under sections 552.108, 552.115, and 552.117 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.<sup>1</sup>

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

...

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Gov't Code § 552.022(a)(1) (emphasis added). In this instance, the submitted documents include completed reports, personnel evaluations, and investigations. The department must release these records under section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 or expressly confidential under other law.

You claim that section 552.108, the "law enforcement exception," protects all of the submitted information. Section 552.108 excepts from disclosure "information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 applies to the information. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You represent to this office that "[t]he information requested is in reference to an individual who is currently the subject of an ongoing criminal investigation by the Bexar County Sheriff's Department, regarding actions taken by the individual while acting as a Bexar County Deputy Sheriff." You contend that "[a]ll of the individual's internal affair[s] reports and personnel file are relevant to this ongoing investigation." Having considered your arguments and reviewed the information at issue, we find that you have demonstrated that the release of the information labeled "current I/A file under investigation" would interfere with a pending criminal case. See Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 at 3 (1978).

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). The department must release the types of information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-87. The department may withhold the remaining information labeled "current I/A file under investigation" under section 552.108(a)(1).

On the other hand, we find that you have not demonstrated that the release of the information in the exhibits labeled "personnel file" and "representative sample other I/A files" would interfere with the pending criminal investigation. Therefore, the department may not withhold the information in those exhibits under section 552.108(a)(1). See also Open Records Decision Nos. 562 at 10 (1990) (stating that law enforcement exception does not protect general personnel information about a peace officer or information concerning complaints filed against the officer), 361 at 3 (1983) (information relating to complaints against peace officers and disciplinary actions resulting therefrom not excepted under statutory predecessor), 350 at 3 (1982) (law enforcement exception does not generally protect information relating to complaints against peace officers if no criminal prosecution results).

We note, however, that section 552.101 of the Government Code protects some of the remaining information.<sup>2</sup> Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. The Seventy-seventh Legislature recently added sections 559.001, 559.002, and 559.003 to the Government Code, effective September 1, 2001.<sup>3</sup> These new statutes provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

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<sup>2</sup>Unlike other exceptions to disclosure under chapter 552 of the Government Code, this office will raise section 552.101 on behalf of a governmental body, as chapter 552 makes the release of confidential information a criminal offense. See Gov't Code §§ 552.007, .352; Open Records Decision No. 325 (1982).

<sup>3</sup>See Act of May 24, 2001, 77<sup>th</sup> Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003).

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the department must withhold the fingerprint information that we have marked under section 559.003 of the Government Code.

Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. See Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

*Id.* § 1703.306. The submitted records contain information relating to polygraph examinations that section 1703.306 makes confidential. The requestor is not a person to whom section 1703.306 grants access to this information. We have marked the information that the department must withhold under section 1703.306 of the Occupations Code.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. §20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. See Gov't Code §411.083(a); see also *id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. See *id.* §411.084; see also *id.* §411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, where a governmental entity has compiled an individual's criminal history, the compiled information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).<sup>4</sup> Thus, to the extent that the remaining records contain any criminal history record information obtained from the TCIC or NCIC, that information must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. To the extent that these records contain any other criminal history information that the department compiled, that information must be withheld under section 552.101 in conjunction with *Reporters Committee*.

Section 552.101 also encompasses common law privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when the information (1) is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs); see also Open Records Decision No. 659 at 4-5 (1999) (listing other types of information that attorney general has determined to be private). We have marked information relating to a juvenile offender that is protected by common law privacy and must be withheld under section 552.101.

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<sup>4</sup>Section 552.101 also protects information that comes within common law and constitutional rights of privacy. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 678-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You raise section 552.115 of the Government Code. Section 552.115 provides that a birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure. Because section 552.115 applies only to a birth certificate maintained by the bureau of vital statistics or a local registration official, the department may not withhold the certificate of birth in the personnel file under section 552.115. *See* Open Records Decision No. 338 (1982).

You also raise section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the social security number, home address, home telephone number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer has complied with section 552.024 of the Government Code. It appears to this office that the submitted records pertain to a peace officer. Therefore, section 552.117(2) requires the department to withhold the officer's social security number, current and former home addresses and telephone numbers, and information that reveals whether the officer has family members. Furthermore, section 552.117(2) requires the withholding of this information even if the peace officer in question has left the department. We have marked the information that the department must withhold under section 552.117(2).<sup>5</sup>

Section 552.119 of the Government Code excepts from disclosure "[a] photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . the release of which would endanger the life or physical safety of the officer." Gov't Code § 552.119(a). This office has held that a claim under section 552.119 does not require a threshold showing that release of a photograph would endanger the officer depicted. *See* Open Records Decision No. 502 (1988). The exhibit labeled "representative sample other I/A files" contains photographs. If these are photographs of peace officers, then they must be withheld under section 552.119.

The remaining records also contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

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<sup>5</sup>We note that section 552.117(2) and other information has been redacted from some of the submitted documents. This office cannot review redacted information. In the future, you must submit requested information in a manner that enables this office to determine whether the information is excepted from disclosure. *See* Gov't Code §§ 552.301(e), .302.

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the information that the department must withhold under section 552.130.

In summary, the department may withhold the information in the exhibit labeled "current I/A file under investigation" under section 552.108(a)(1) of the Government Code, but must release basic information under section 552.108(c). The department may not withhold the exhibits labeled "personnel file" and "representative sample other I/A files" under section 552.108. However, these exhibits contain information that must be withheld under sections 552.101, 552.117, and 552.130. A photograph of a peace officer is excepted from disclosure under section 552.119. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

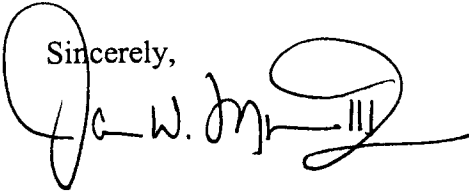
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a distinct "III" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 152771

Enc: Marked documents

c: Mr. Rafael Leal  
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